(2)

No. 00-987

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Petitioners*

v.

SAROEUT OURK, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed who is inadmissible . . . , removable [for a criminal offense], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period," as that period is set out in 8 U.S.C. § 1231(a)(1)(A). The Immigration and Naturalization Service (INS) maintains that it has the authority to detain Saroeut Ourk pursuant to this provision, even though he is a long-time resident alien of this country, and it cannot deport him in the foreseeable future. The questions presented are:

1. Whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) violates the due process guarantee of the Fifth Amendment of the United States Constitution because it permits indefinite detention of an alien ordered deported whose deportation cannot be effectuated in the reasonably foreseeable future, even where the government's legitimate interests can be accomplished by less restrictive means.

2. Whether the narrow interpretation of § 1231(a)(6) suggested by the circuit court in *Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000), to permit detention beyond the 90-day removal period in order to effectuate deportation, is correct because that interpretation avoids the constitutional problem raised by the Attorney General's interpretation and is not contrary to the "plain" intent of Congress.

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OPINIONS BELOW

The petition for *certiorari* correctly cites to the unreported district court and Court of Appeals opinions below. App. A, B & C to Pet. for Cert. 1a-13a. The district court order denying the government's motion to stay Mr. Ourk's release pending their appeal to the Ninth Circuit is not reported. App. A, *infra,* 1a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. § 1231(a)(6), 8 C.F.R. §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Ourk's release is 8 U.S.C. § 1253(a)(1), which provides:

> Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who --
>
> > **(A)** willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the

> final order of the court,
>
> **(B)** willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,
>
> **(C)** connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or
>
> **(D)** willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

and 8 U.S.C. § 1253(b), which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT

The lower court opinions correctly set forth the facts of the case and the procedural background. Pet. for Cert. 1a-7a.

By writ of habeas corpus, Mr. Ourk challenged on statutory and federal constitutional grounds his ongoing detention by the INS because his deportation order cannot be effectuated in the reasonably foreseeable future, if ever. Both of the lower courts ruled in Mr. Ourk's favor. The Court of Appeals affirmed the grant of Mr. Ourk's writ of habeas corpus based on the circuit's decision in *Ma v. Reno,* 208 F.3d 815 (9th Cir.), *pet. reh'g denied* (June 2, 2000), *cert. granted,* 121 S.Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38). In light of the grant of

certiorari in *Ma*, Mr. Ourk waives his right to file a Brief in Opposition. Mr. Ourk does not thereby waive any objections to the government's recitation of the facts which are either inaccurately stated in, or omitted from, the petition for *certiorari.*

ARGUMENT

The questions presented by this case are whether the Attorney General has the statutory authority to detain a long-time resident alien of the United States whose deportation order cannot be effectuated in the reasonably foreseeable future, if ever, and if so, whether that detention runs afoul of Mr. Ourk's substantive due process rights under the Fifth Amendment of the United States Constitution. These same issues are presented in *Ma v. Reno,* 208 F.3d 815, and *Zadvydas v. Underdown,* 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S.Ct. 297, 69 USLW 324, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791), in which the Court granted *certiorari* review on October 10, 2000.

Accordingly, Mr. Ourk does not waive any objections to the government's recitation of the proper legal analysis in Mr. Ourk's case. He nevertheless agrees with the government that consideration of the government's petition in this case should be held pending the Court's decision in *Ma* and *Zadvydas*.

CONCLUSION

The government's petition for *certiorari* should be held pending this Court's decision in *Reno v. Ma,* No. 00-38, and *Zadvydas v. Underdown,* No. 99-7791, and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted,

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January 3, 2001